

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:)	01-MDL-875
)	
ASBESTOS PRODUCTS)	Philadelphia, PA
LIABILITY LITIGATION)	June 6, 2012
)	9:00 a.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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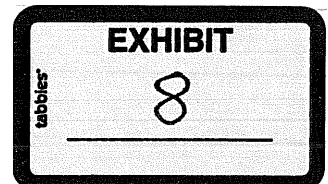
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1 (The following was heard via telephone conference at
2 9:00 a.m. in Judge's chambers.)

3 THE COURT: Good morning.

4 COUNSEL: Good morning, Your Honor.

5 THE COURT: Can I take --

6 COUNSEL: Good morning, Judge.

7 THE COURT: Let me take role, if I may. We have
8 Alan on, Alan Vaughan, Mike Cascino, Miles Horton on for
9 plaintiffs. Anybody else on for plaintiffs? I thought I
10 heard Mr. McCoy's voice, did I not?

11 MR. McCOY: Yes. Mr. McCoy is here.

12 THE COURT: Okay. All right. Bob Spinelli, Tom
13 Burns, Jennifer Studebaker, Dave Setter, Jack McCance, Ed
14 Casmere, Ryan Connelly, Caitlin Chenevert, Joe Sullivan, Eric
15 Ludwig, Katie Downey, Mike Antikainen. And anybody else on
16 for defendants?

17 MR. DRUMKE: Mike Drumke, Your Honor.

18 THE COURT: Mike Drumke. Okay, Mike.

19 MR. LAUTH: Richard Lauth.

20 MS. TAYLOR: Tobin Taylor.

21 THE COURT: I got Richard Lauth and Tobin Taylor.

22 MR. MULHOLLAND: Denny Mulholland.

23 THE COURT: And Denny Mulholland. Okay. All right.
24 The first thing that I just wanted to make you -- give you
25 heads up on, we've spent a bit of time on the defendant's

1 motion for protective order with respect to the request to
2 admit and request for production that were served upon the
3 defendants by plaintiffs. And I think what I want to do with
4 that is have a separate call, not to burden everybody. It
5 might take a little bit of time. I do want to go through
6 these with some care. And just to give you a heads up, I
7 could give you time tomorrow, starting at 11 east coast time,
8 or starting about 3:45 east coast time. The other alternative
9 would be Friday, starting about 11:30 east coast time. Let's
10 take --

11 MR. CASCINO: Tomorrow, for the plaintiffs, Your
12 Honor.

13 THE COURT: I'm sorry, Mike?

14 MR. CASCINO: Tomorrow would be best for the
15 plaintiffs.

16 THE COURT: Okay.

17 MR. SETTER: Your Honor, Dave Setter. Then how
18 about tomorrow afternoon?

19 THE COURT: Okay.

20 MR. SETTER: Did you propose 3:45 eastern?

21 THE COURT: Yes.

22 MR. SETTER: I'll set the call up for that time
23 then, if that's okay with everyone.

24 THE COURT: Good. Okay. And I think you saw, I
25 think, I asked Joel to send out a brief email just

1 highlighting -- you know, I'm sure you guys -- it's been
2 briefed. I think I have a sense of what your issues are, and
3 I just ask you to focus upon those points that are in -- just
4 to make sure you cover those points that are in the email that
5 Joel sent to you yesterday.

6 MR. SETTER: We'll do that.

7 THE COURT: Okay. Let's go to the list from the
8 parties. I have the plaintiff's -- first on the plaintiff's
9 list is the attorney-client privilege screening form marked at
10 Dr. Frank's deposition. This I know nothing about. What's
11 the -- what's the deal here? Who's handling this for the
12 plaintiffs?

13 MR. MCCOY: This came up yesterday. This is Bob
14 McCoy. So this came up yesterday, Judge, when the defendants
15 had Dr. Arthur Frank, who's a medical doctor there in
16 Philadelphia, at his deposition, had -- and he's one of our
17 experts. They had one of the -- what we call a client
18 screening forms of Cascino Vaughan, which are marked as
19 attorney-client confidential, and we use those to get intake
20 information from clients. We don't disclose those to other --
21 outside of this firm. But somehow one had apparently been
22 inadvertently produced during the processes of all these
23 productions, and the defense marked it, even though it's
24 labeled attorney-client communication, and started examining
25 Dr. Frank on it.

1 So I had -- I just objected and asserted the
2 privilege during the deposition. And I -- I just don't
3 understand, frankly, why there was any use of that form at
4 all, and why it wasn't tendered back to us because that's how
5 I understand the law operates when you have something like
6 that, that's clearly marked attorney-client communication. So
7 I -- that's why it's on the agenda, Judge, because I don't
8 know even that there should be any question with that. That
9 document should be returned to our law firm.

10 THE COURT: Okay. What happened to the questioning
11 with respect to the document at the deposition?

12 MR. McCOY: So the questioning -- questioning was
13 done because it didn't really involve any -- any issues that
14 would be so confidential as to -- as to require, you know, --

15 THE COURT: Okay.

16 MR. McCOY: -- not being able to answer by the
17 doctor.

18 THE COURT: All right.

19 MR. McCOY: But certainly the information in the
20 communication was confidential and should -- should be
21 protected and should be respected under the law. I mean, that
22 -- that shouldn't have even gone forward, is the way that the
23 law reads.

24 THE COURT: All right. Well, I -- you might be
25 right, I don't know. Anybody on the defendant's side was

1 involved in that yesterday is on the phone now?

2 MR. CASMERE: Yes, Your Honor. Edward Casmere. I
3 was taking Dr. Frank's deposition. I'm the one that marked
4 the exhibit.

5 THE COURT: Okay.

6 MR. CASMERE: The document was actually produced to
7 us from one of the treating physicians for Mr. O'Keefe. It
8 was apparently -- it was apparently sent to the treating
9 physician, and it was produced to Forman Perry on September 9th
10 from one of the treating physicians, and it was in the medical
11 records that we had.

12 The document itself is a -- it's a form that's -- it
13 appears to have handwritten notes on it from the plaintiff
14 himself describing, you know, his name, his address, where and
15 how he was exposed to asbestos, what products he was exposed
16 to, what his smoking history was, all sorts of information
17 that are statements of a party. There is a small notation at
18 the top that says confidential attorney-client work product,
19 but just because you label it as such, doesn't mean that it
20 is. And having it been produced to us through a treating
21 physician, I think, changes the nature of the document to the
22 extent it even is privileged in the first place, which I don't
23 think the defense concedes it is.

24 I think that at this point, we certainly can tender
25 the document to the Court. But I think we also need to take

1 the deposition of the treating physician to see how and why it
2 was that it was sent to them and what they did with it, if
3 anything.

4 MR. SETTER: Your Honor, Dave Setter. I just want
5 to add on that I now have been made aware of what this
6 document is, in our motion to compel filed on November 11th,
7 2001, we talk about a cover letter about the asbestos
8 screening program. The Cascino Vaughan law offices'
9 enterprise known as the asbestos screening department sent
10 these out, and this is an asbestos screening packet that's
11 referred in one of the exhibits in that motion. So it's been
12 raised to the Court.

13 We had a hearing, as you recall, back in December
14 about these issues. We went around and around with this, all
15 the way up to Judge Robreno and back again. This was included
16 as a transmission to one of the treating doctors to have --
17 Mr. Vaughan wanted him to generate some type of affidavit, and
18 apparently this information was sent to this doctor for that
19 purpose and -- along with the information of Dr. Schonfeld and
20 others. These asbestos screening packets were requested to be
21 produced by us, and to the extent that they have been
22 produced, I think we need to have Cascino Vaughan produce all
23 of them for all the pending cases.

24 THE COURT: Well, I guess that answers the question
25 I was asking myself, which was how significant is this in the

1 context of the overall. And, you know, hearing you guys, I
2 guess it has more significance than a one --

3 MR. SETTER: Very significant.

4 THE COURT: Yeah. All right. All right.

5 MR. SETTER: It's significant from the standpoint of
6 the issue that we went into in terms of how exposure
7 information has been generated by Cascino Vaughan's screening
8 personnel, as opposed to the physicians, and we need to test
9 that in depositions of doctors and so on and so forth, as well
10 as in the Daubert hearing.

11 The issue was if, in fact, the doctors gather this
12 information independently, that's a -- that's a different
13 matter. But, in fact, most of the exposure information, from
14 what we can tell, has been generated by Cascino Vaughan
15 personnel, screening personnel, with their screening
16 department. And this is a -- it says at the top of the
17 document, asbestos screening packet. That's what it is. And
18 we have some transmittal letters indicating that they have
19 sent these screening packets to various plaintiffs, if not all
20 of them.

21 THE COURT: Did Dr. --

22 MR. SETTER: And I think we're -- we're entitled to
23 all of them.

24 THE COURT: Did Dr. Frank testify as to any
25 familiarity with the document?

1 MR. CASMERE: No, Your Honor, he did not.

2 THE COURT: Okay. And then I take it -- then I take
3 it with respect to this document at this deposition, that was
4 really the end of it?

5 MR. CASMERE: Yeah. There's very limited questions,
6 Your Honor, and at the end of the deposition -- or actually
7 during the deposition, Mr. McCoy made his objection, and I
8 told him that I did not have any problem with him taking the
9 original document that we marked at the deposition. And he's
10 now in custody of that document. It is not being attached to
11 the transcript. And we, at the deposition, said that -- and I
12 agreed that I would be more than happy to take this up with
13 the Court. You know, the purposes for which I was trying to
14 use it are statements in the document about the gentleman's
15 exposure history and smoking history that are inconsistent
16 with other things, and I asked Dr. Frank if that had any
17 impact on his opinions in the case.

18 THE COURT: All right. Okay. Well, it's clear to
19 me that this is not the kind of thing that can be resolved in
20 this context. I do appreciate a heads up on it. I guess I
21 would have thought that the most logical way to key this up,
22 if it needs to be keyed up, would -- at least certainly the
23 case in Mr. Setter's mind, I appreciate -- would be for some
24 kind of a motion to be generated from the defense with respect
25 to the question of whether or not there are -- this particular

1 document and what other documents of a similar nature have
2 been produced, have not been produced, why they have not been
3 produced. I mean, to be honest, Mr. Setter and Mr. McCoy, I
4 do not have a clear -- I mean, I recall generally, I mean,
5 we've obviously had a lot of discovery disputes, I don't
6 recall how this one -- the previous forum in which this one
7 arose. So I'd have to be reminded about that. Is it your
8 position, Mr. Setter, that either I or Judge Robreno have made
9 previous rulings which you believe would control this issue?

10 MR. SETTER: I do, from the standpoint of
11 transmittal of documents back on, I believe, December 9th, Your
12 Honor, as part of that order.

13 THE COURT: Yeah, that does sound right. And I
14 don't remember what the full context of it was. But I think
15 it needs to be brought up in that context. So I hear Mr.
16 McCoy's comment. I certainly agree that simply putting a
17 stamp on a document doesn't make it something with legal
18 implication. It does indicate an intent on the part of the
19 party who placed the stamp, presumably the plaintiffs, I -- or
20 plaintiff's counsel, I understand that, and that could be of
21 -- could be of some evidentiary value. But that doesn't
22 necessarily conclusively determine what the -- or the way the
23 document would have to be classified.

24 So I'm going to leave this back to the -- to you
25 all, the parties, and it sounds like maybe the defendant would

1 do it, but it's up to you all, the parties, to make the
2 determination as to how you want to proceed with respect to
3 motion, to the extent that you believe that the issue is
4 larger than just simply one document presented to one doctor
5 in one deposition that did not have a -- you know, from what
6 I'm hearing, didn't take up a lot of time and testimony. So
7 that --

8 MR. SETTER: Thank you, Your Honor. I think a
9 motion to compel in all the pending cases --

10 THE COURT: Yeah.

11 MR. SETTER: -- is probably warranted.

12 THE COURT: Yeah. And that would give --

13 MR. SETTER: We'll proceed accordingly.

14 THE COURT: -- would give you guys an opportunity to
15 play back some of the history on this issue. Mr. McCoy, is
16 there anything else you want to add to this, in light of the
17 comments made by Mr. Setter and Mr. Lauth?

18 MR. MCCOY: No, Judge. Apparently, they said they
19 were aware of these a long, long time ago. So, like I say,
20 these are regular -- routine attorney-client communications to
21 take your clients in the house. So I -- I think that that --
22 that should be the end of it, Judge, and nobody should be
23 using these forms.

24 THE COURT: Okay.

25 MR. MCCOY: They were aware a long time ago, --

1 THE COURT: Yeah. I --

2 MR. McCOY: -- as I said, --

3 THE COURT: Okay. I understand.

4 MR. McCOY: -- filed out. Now, it's something that
5 simply because we noted that it was a privileged document,
6 that now the defense all said wants all of it, even though
7 they've known about these for months and months, Judge. I
8 don't get it.

9 THE COURT: Well, we'll see what the -- we don't --
10 I don't need any more discussion about it now, Mr. Setter.
11 Let's get this properly briefed up and we'll deal with it.

12 All right. The next question concerns the issue
13 with respect to the payment of the witness fees. I did review
14 the email that was sent by Mr. Hanbury yesterday, and I -- I
15 understand, I think, the nature of the problem. I want to
16 know whether or not Ms. Studebaker or anybody from Forman
17 Perry wants to update me at all. Is there anything new on
18 this? I do understand broadly the position that apparently
19 some defendants have not yet paid in their fair share of the
20 expert fees, and I guess the question remains, you know, how
21 we do -- what we do about that, whether there are going to be
22 the legal implications with respect to cost. But, Ms.
23 Studebaker, do you want to add anything to this, at this
24 point?

25 MS. STUDEBAKER: Your Honor, the only thing is that

1 I would like to add, is that obviously the information that
2 Mr. Hanbury provided yesterday was very helpful in terms of
3 who has paid and who has not. I do not know, and I don't
4 believe, that that information has been circulated outside the
5 defense liaison committee, which is problematic in terms of
6 CVLO being paid, because many of the participants are not
7 privy to that email or this call every week. And so if they
8 intend to make any progress, my suggestion would be that
9 either they send that out or we send that out, so that all of
10 the defendants are aware of the deficiencies that still remain
11 with regard to the top 10 experts.

12 THE COURT: Yeah. Okay. And on a -- then on a
13 going forward basis, this issue has been kicking around for a
14 little bit, I'm of the view that some of the protocols that
15 we've set up on other issues have been helpful to the
16 management of this case, and I think that I'd like to see
17 something done here. And I'm going to ask Mr. Hanbury to
18 prepare a draft of a protocol, the elements of which I would
19 simply want to engraft upon the present practice that you all
20 have agreed to and engaged in, with some modification. And
21 the way I understand this has been that Forman Perry has
22 agreed, and I hope would continue, to carry on the activity
23 with respect to the distribution out to the various defendants
24 who participated in particular depositions, so that there
25 would be an indication as to whatever the pro rata share would

1 be to all defendants. And whether or not that goes from the
2 Forman Perry or goes from the plaintiffs, I'll leave to --
3 I'll leave to you all to discuss maybe with Mr. Hanbury and
4 Ms. Studebaker.

5 But I think that what we need to do is indicate
6 within the protocol that the invoices would be considered due
7 and owing within a period of 30 days from the time of receipt;
8 that perhaps we'd have a short grace period, maybe a 15-day
9 grace period, something of that sort. And that should there
10 be a failure on the part of any particular defendant to make a
11 payment, the responsibility for chasing that, I'm not going to
12 put on Forman Perry, I'm not going to obligate Forman Perry to
13 front all the money and then chase the collection afterwards,
14 I don't think that's fair, but I do think we can impose some
15 significant incentives and potential sanctions for the
16 defendants who have been recalcitrant or have been unable to
17 pay. And something of the sort of, you know, some kind of --
18 some kind of, you know, somewhat punitive interest would be
19 applied. One percent a month might not be enough; maybe two
20 percent a month, something of that sort. Or maybe if anything
21 gets to the point where it has to be a motion, the cost to the
22 plaintiff in terms of fees to chase -- to chase any of this
23 money would be -- would be a sanction that would be imposed
24 upon any defendants. But -- and if there's any issue with
25 respect to the amount, that that needs to be promptly brought

1 to my attention and we'll resolve it.

2 My recollection is, I'm hesitating because I'm not
3 certain, but I thought we had previously written on the
4 question of the extent to which expert fees are reimbursed.
5 It's very clear to me from the rule that the time spent in
6 connection with preparing for the deposition is recoverable.
7 But that time spent is not -- it cannot be utilized for the
8 purpose of the strategizing that the -- that the expert would
9 have with his own -- his or her own counsel. That's not
10 reimbursable. But otherwise the time spent reviewing is
11 reimbursable. It's the way I understand the rule was -- part
12 of rule -- I forget where it is, in Rule 37 or Rule 26. I
13 forget. But there's some language in there that makes it very
14 clear in the rule that the time spent in preparation is
15 reimbursable, and that's -- I've written on that, I know, in
16 other cases, if not this case. And I'm happy to, you know,
17 resolve judgments and make those judgments myself, but I have
18 to know, obviously, if the -- you know, when that issue comes
19 up.

20 So, with those guidelines, let me ask -- let me ask
21 Mr. Hanbury to initiate some particular -- some protocol with
22 respect to this for my -- for Ms. Studebaker's review and
23 input, for my review, and obviously anybody else who needs to
24 -- who needs to be involved in it from the defendant's side.
25 And we'll get something implemented.

1 So that's the way in which I would like to look at
2 it. And it would -- you know, it would then be applicable as
3 to those folks now who are -- you know, who have outstanding
4 invoices.

5 But as a basic principle, I'm not going to accept
6 the plaintiff's proposition that Forman Perry is responsible
7 for 100 percent of the costs up front, and then they seek the
8 reimbursement. I think Forman Perry -- I think it is
9 appropriate to have Forman Perry undertake the work they have
10 been undertaking, in terms of setting all this up and helping
11 to keep track of it, and the spreadsheets and that sort of
12 thing. So hopefully that's enough guidance for plaintiffs to
13 begin to set us some kind of protocol.

14 So, Mr. Hanbury, I'm going to leave that with you to
15 work out with Ms. Studebaker. I'm not going to set up a
16 specific time line on this, but I get the impression you're
17 motivated to try to get this thing done, and I appreciate
18 that. I would hope it could be done within the next few days
19 and you'd have conversations with Ms. Studebaker. If you all
20 need to have some separate conversation with me about that,
21 between the two of you, I'm happy to participate. But I would
22 like to think that you could get something to me, you know,
23 say within the -- at least the early part of next week, at the
24 latest. Is that -- am I clear enough on that?

25 UNIDENTIFIED COUNSEL: Your Honor, this is Mike.

1 MR. McCOY: Yes, Your Honor.

2 UNIDENTIFIED COUNSEL: Kevin is down at a deposition
3 and he will take care of that. However, one of the things
4 that Kevin pointed out to me yesterday, which is a little
5 different from what the Court's focused on --

6 THE COURT: Sure.

7 UNIDENTIFIED COUNSEL: -- is that we're concerned on
8 a going forward basis, in the past let's say Forman Perry
9 would notice up the deposition, then each of the other
10 defendants would also notice up that deposition. What we've
11 now seen is that only Forman Perry is noticing up the
12 deposition and we're concerned as to whether or not we're
13 going to know who's going to be splitting the fees for that
14 particular deposition on a go-forward basis. And we will put
15 that as part of our protocol that Mr. Hanbury suggests. But I
16 did want to make that point to the Court.

17 THE COURT: Well, I think that's --

18 MS. STUDEBAKER: And, Your Honor, this is Jennifer
19 Studebaker. That -- the way that we have been determining the
20 pro rata share does not have to do -- anything to do with the
21 notices or who issues the notices. It is actually the
22 defendants who participate in the deposition.

23 THE COURT: Yeah.

24 MS. STUDEBAKER: So I don't think that that's going
25 to be an issue. But we can certainly include that in the

1 protocol.

2 THE COURT: Okay. Good. Okay. The next is the GP
3 document production. What's the -- what's the status of that?
4 Is this Mr. Drumke or Ms. Chenevert's issue? Who's --

5 MR. McCOY: That was -- that was as a result of a
6 letter sent by Mr. Drumke yesterday.

7 THE COURT: Letter sent to you, Bob?

8 MR. McCOY: Yes.

9 THE COURT: Okay. Good. The issue on the Bob Smith
10 deposition, I think you saw that we did sign the order on that
11 one. Has that been -- all right, we -- okay. Lauren --
12 Lauren says it has not yet been posted on the docket. We'll
13 email that out to you all. But the order does reflect the
14 continuance of the deposition to June 27th at 10:00 at the --
15 whatever this hotel in Sheboygan, Wisconsin. So that's been
16 -- that's been done. It's been -- we filed it, right? We
17 filed it yesterday. It was filed yesterday, and the order is
18 dated yesterday. So, Lauren will send that out to her
19 distribution list by email, so you'll have that with
20 electronic signature.

21 All right. The defendants have raised a question
22 with respect to the plaintiffs' expert witnesses and our
23 scheduling order. So who's going to address that?

24 MS. STUDEBAKER: Your Honor, this is Jennifer
25 Studebaker. That was actually my agenda item. Mr. McCoy and

1 I communicated yesterday afternoon, and they have provided us
2 with dates for a number of the witnesses that we did not have
3 previously. So I don't think there's any need for any further
4 discussion on that point at this time.

5 THE COURT: This is very impressive. I have to tell
6 you I have a couple of interns here sitting around listening
7 to this, law students, and I'm sure they're very glad to hear
8 that we have lawyers that are cooperating with each other.
9 So, thank you very much for that.

10 That's all that we have on here for today. So, I
11 guess we'll talk to you next Wednesday morning. And those of
12 you that are involved in this request to produce and the
13 request to admit, 3:45 on Thursday afternoon east coast time.
14 Thanks very much, folks.

15 ALL: Thank you, Your Honor.

16 (Proceedings concluded at 9:25 a.m.)

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C E R T I F I C A T I O N

I, Roxanne Galanti, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter.

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June 7, 2012